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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CITY OF SAN DIEGO, Plaintiff and Appellant, v. TRACY L. MEANS, Defendant and Respondent.	D052499 (Super. Ct. No. GIC858344)

APPEAL from an order of the Superior Court of San Diego County, Joan M. Lewis, Judge. Reversed.

This is a companion case to *City of San Diego v. Means* (Jan. 7, 2009, D051840 [nonpub. opn.]) (*Means I*), in which we affirmed in part and reversed in part a summary judgment in favor of Tracy Means, a former deputy director who managed the City of San Diego's (the City) two airports, on the City's action against her for improperly discharging her job duties. We held there were triable issues of fact pertaining to whether

Means "knowingly" presented false claims to the City, thereby violating California's False Claims Act (CFCA). (Gov. Code, § 12650 et seq.)[1]

In this appeal, the City challenges the trial court's postjudgment order awarding Means $245,130 in attorney fees under section 996.4, which pertains to a public employee's right to reimbursement of defense costs incurred in litigation arising from the performance of his or her job duties, absent certain exceptions. Because we reversed the summary judgment in part in *Means I*, we also reverse the attorney fees order.

FACTUAL AND PROCEDURAL BACKGROUND

The City's action arose from Means's violation of its rules and regulations pertaining to competitive bidding and the letting of contracts for consultant services. Between September 2000 and June 2005, Means exceeded her authority by approving 13 purchase requisitions for a single consulting company for services related to the operations, management and profitability of the two airports. The purchase requisitions totaled $308,000, but Means authorized individual contracts for between $20,000 and $25,000, as she believed (erroneously) that she had authority to approve contracts up to $25,000. Means also characterized the first contract as a "sole source" contract — meaning no competitive bidding would be required — without following proper procedures. Means wrote a memorandum to the City's purchasing agent, which was ostensibly from Means's superior and the director of her department, requesting the contract based on time constraints and the consultant's unique qualification as a proven

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1 Statutory references are to the Government Code unless otherwise specified.

leader in its field. Means signed her name over her supervisor's name, but he was unaware of the memorandum.

In November 2006 the City terminated Means's employment. The following month, Michael Aguirre, who was then City Attorney, filed an action against Means and others. As relevant here, the fourth amended complaint (hereafter complaint) contained causes of action against Means for intentional misrepresentation (first), negligent misrepresentation (second), fraudulent concealment (eleventh), violation of California's unfair competition law (UCL; Bus. & Prof. Code, § 17200 et seq.) (fifth), violation of the CFCA (sixth and seventh), and violation of section 108 of the City's Charter (twelfth). The complaint variously prayed for restitution, actual damages, statutory treble damages and civil penalties, punitive damages and prejudgment interest. The City's theory was that Means had a personal relationship with two principals of the consultant, and they colluded to give the consultant business.

Means requested that the City provide her with a defense under section 995.[2] That, of course, created an unusual situation as the provision of a defense would require

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2 Section 995 provides: "Except as otherwise provided in Sections 995.2 and 995.4, upon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official or individual capacity or both, on account of an act or omission in the scope of his employment as an employee of the public entity."

Under section 995.2, subdivision (a) a public entity may refuse to provide for the defense of an employee or former employee if it determines any of the following: "(1) The act or omission was not within the scope of his or her employment. [¶] (2) He or she acted or failed to act because of actual fraud, corruption, or actual malice. [¶] (3) The defense of the action or proceeding by the public entity would create a specific conflict of interest between the public entity and the employee or former employee." A

the City to pay for counsel for both sides of the litigation. In March 2006 the City Council refused based on a conflict of interest.

In April 2006 Means filed a petition in the superior court for a writ of mandate to compel the City to provide her with a defense under section 995. (*Means v. City of San Diego* (Super. Ct. San Diego County, GIC864419.) In the writ proceeding, both parties moved for summary judgment. In September 2007 the court denied Means's motion and granted the City's motion on the ground the City Council properly determined the City's provision of a defense for her would create a specific conflict of interest, and thus there was an exception to the defense obligation under section 995. Judgment in the writ proceeding was entered on November 8, 2007,[3] and Means did not appeal it.

In this action, Means moved for summary judgment, or in the alternative summary adjudication. The court found no triable issues of material fact on any of the complaint's counts and entered judgment for Means on September 20, 2007.

" 'specific conflict of interest' means a conflict of interest or an adverse or pecuniary interest, as specified by statute or by a rule or regulation of the public entity." (§ 995.2, subd. (a)(3).)

Under section 995.4, the provision of a defense is optional under certain circumstances. (§ 995.) "A public entity may, but is not required to, provide for the defense of: [¶] (a) An action or proceeding brought by the public entity to remove, suspend or otherwise penalize its own employee or former employee, or an appeal to a court from an administrative proceeding by the public entity to remove, suspend or otherwise penalize its own employee or former employee. [¶] (b) An action or proceeding brought by the public entity against its own employee or former employee as an individual and not in his official capacity, or an appeal therefrom." (§ 995.4.)

3 We grant the City's unopposed request for judicial notice dated February 5, 2009.

Despite the judgment in the writ proceeding, Means then moved in this action for attorney fees under section 995. The court determined Means was not entitled to fees under section 995, as the City properly denied her a defense based on a specific conflict of interest. The court, however, denied the motion without prejudice to give Means the opportunity to move for reimbursement of defense costs under section 996.4,[4] as she raised that statute only in her reply papers.

The City filed its notice of appeal in *Means I*, and Means again moved for defense costs, this time under section 996.4. In January 2008 the court determined Means was entitled to reimbursement of defense costs, and in February it awarded her $245,130 in attorney fees and $5,864.73 in other costs.

On January 7, 2009, we filed *Means I*, which affirms the summary judgment for Means insofar as it concerns the three misrepresentation counts, based on her complete immunity under section 822.2, which provides: "A public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation, whether or not such misrepresentation be negligent or intentional, unless he is guilty of actual fraud, corruption or actual malice." We explained that Means satisfied her burden of showing

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4 Section 996.4 provides: "If after request a public entity fails or refuses to provide an employee or former employee with a defense against a civil action or proceeding brought against him and the employee retains his own counsel to defend the action or proceeding, he is entitled to recover from the public entity such reasonable attorney's fees, costs and expenses as are necessarily incurred by him in defending the action or proceeding if the action or proceeding arose out of an act or omission in the scope of his employment as an employee of the public entity, but he is not entitled to such reimbursement if the public entity establishes (a) that he acted or failed to act because of actual fraud, corruption or actual malice, or (b) that the action or proceeding is one described in Section 995.4." (§ 996.4.)

"she was not '*motivated* by corruption or actual malice, i.e., a conscious intent to deceive, vex, annoy or harm the injured party in his business.' " (*Means I, supra,* D051840, at p. 12, citing *Schonfeld v. City of Vallejo* (1975) 50 Cal.App.3d 401, 410, disapproved of on another ground in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743-744.) The burden then shifted to the City, and it failed to adduce any evidence to support its theory that Means colluded with two of the consultant's principals because of personal relationships with them. (*Means I, supra,* D051840, at pp. 13-17.)

We also affirmed the summary judgment on the counts for violation of the UCL and section 108 of the City's Charter, as those provisions are inapplicable. (*Means I, supra,* D051840, at pp. 17-20, 26-27.) However, we reversed the judgment insofar as it concerns two counts under the CFCA (sixth and seventh) because even though there was no evidence Means acted maliciously, there were triable issues of fact as to whether she "knowingly" presented the City with false claims within the meaning of the CFCA.[5]

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5 Under the CFCA, a public entity may recover treble damages, plus costs, and civil penalties from any person who "[k]nowingly presents or causes to be presented to an officer or employee of the state or of any political subdivision thereof, a false claim for payment or approval," or "[k]nowingly makes, uses, or causes to be made a false record or statement to get a false claim paid or approved by the state or by any political subdivision." (§ 12651, subd. (a)(1) & (2).) For purposes of the CFCA, a "claim" includes "any request or demand for money . . . made to any employee, officer, or agent of the state or of any political subdivision." (§ 12650, subd. (b)(1).) The term "knowingly" means "that a person with respect to information, does any of the following: [¶] (A) Has actual knowledge of the information. [¶] (B) Acts in deliberate ignorance of the truth or falsity of the information. [¶] (C) Acts in reckless disregard of the truth or falsity of the information." (§ 12650, subd. (b)(2).) Specific intent to defraud is not required. (§ 12650, subd. (b)(2)(C).)

DISCUSSION[6]

The City contends that since *Means I* reversed the summary judgment on the CFCA counts, we must reverse the order awarding defense costs under section 996.4 as premature. The City alternatively contends the order should be reversed on the ground of res judicata, since Means litigated her right to a defense in the previous writ proceeding, and the judgment against her there is final, and because the City's action is one to "otherwise penalize" Means within the meaning of section 995.4, subdivision (a), an exception to the section 996.4 reimbursement obligation.

Means asserts that when the language of section 995.4, subdivision (a) is considered as a whole, it is clear that the term "otherwise penalize" refers to some type of disciplinary action. The City counters that since section 995.4, subdivision (a) pertains to "former employees" as well as employees, and an employer cannot bring a disciplinary action against a former employee, the "otherwise penalize" language necessarily refers to a civil action against a former employee for treble damages and civil penalties. Means submits that even if section 995.4, subdivision (a) applies to a civil action for damages, it is inapplicable here because the City principally seeks reimbursement of the amounts spent on the allegedly illegal consultant contracts. Means also asserts we should affirm the order, as her right to reimbursement of defense costs does not hinge on whether she is

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6 The regular briefing in this case was completed before we issued *Means I*. After oral argument, we asked the parties to provide supplemental briefing on the effect of *Means I* on the defense costs issue. They complied and we have considered their responses.

the prevailing party. In other words, she is entitled to reimbursement regardless of whether she ultimately prevails on the remaining two CFCA counts.

Ordinarily, an order awarding attorney fees and other costs "falls with a reversal of the judgment on which it is based." (*Merced County Taxpayers' Assn. v. Cardella* (1990) 218 Cal.App.3d 396, 402.) Although that principal is usually based on prevailing party concepts (see, e.g., *Butler-Ruff v. Lourdeaux* (2007) 154 Cal.App.4th 918, 928; *Merced County Taxpayers' Assn. v. Cardella*, at p. 402), we decline to reach the complicated issues here, since the matter may settle or otherwise be resolved without the parties' further resort to this court. Means may, of course, move anew for reimbursement of defense costs after the remaining CFCA counts are resolved.

DISPOSITION

The order awarding Means reimbursement of her defense costs under section 996.4 is reversed. The parties are to bear their own costs on appeal.

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McCONNELL, P. J.

WE CONCUR:

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HALLER, J.

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O'ROURKE, J.